IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PETITION NO.6937 OF 2005
WITH
WRIT PETITION NOS.7312, 7313, 7314, 7315, 7349 & 6457/05

W.P. No.6937/05 :

Hanil Era Textiles Ltd.,
a limited Company incorporated under
the Companies Act, 1956 having its factory
premises situate at Vilalge Vanivali,
Taluka Khalapur, District Raigad. ...Petitioner.

Vs.

-1. Hindustan Petroleum Corpn. Ltd.
Through General Manager, West Zone,
Purchase Dept. II nd Floor,
R.C. Bldg, Sir J.J. Road,
Byculla, Mumbai-400 008.
2. Indian Oil Corpn. Ltd.,
Maharasthra State Office,
Badamiya Manohar
Kesarwal Khade Marg,
Mahalaxmi, Mumbai-39.
3. Bharat Petroleum Corpn. Ltd.,
12/F Maker Tower, Cuffe Parade,
Mumbai-5.
4. I. B. P. Company Ltd.,
behind Stock Exchange,
Allahabad Bank Bldg.,
Mumbai Samachar Marg,
Mumbai-400 023. ...Respondents.

....

Mr. M. M. Vashi for the Petitioner.
Mr. M.D. Siodia i/b. M/s. Rustomji & Ginwala for Respondent No.1.
Ms.D. S. Retiwala for Respondent Nos.2 to 4.

.....

W.P. No.7312/05 :

M/s. Satyam Petrochemicals. ...

Petitioner.

Vs.

The State of Maharashtra & Ors. ...Respondents.

....

W.P. No.7313/05 :

M/s. Precious Alco & Petro (India) Pvt.Ltd. ...Petitioner.

Vs.

The State of Maharashtra & Ors. ...Respondents.

....

W.P. No.7314/05 :

M/s.Sai Agro (India) Chemicals. ...Petitioner.

Vs.

The State of Maharashtra & Ors. ...Respondents.

....

W.P. No.7315/05 :

M/s. Paramount Alcohol. ...Petitioner.

Vs.

The State of Maharashtra & Ors. ...Respondents.

....

W.P. No.7349/05 :

M/s. Shriram Trading & Mfg.Co.. ...Petitioner.

Vs.

The State of Maharashtra & Ors. ...Respondents.

....

Mr. Nilesh Patil for the Petitioner.
Mr. Vinay Sonpal, AGP for Respondent Nos.1 to 3.
Mr. M.D. Siodia with Ms. D.S. Retiwala for Respondent Nos.5 to 7.

.....

W.P. No.6457/05 :

M/s. Hanil Era Textiles Ltd. ...Petitioner.

Vs.

The Secretary & Ors. ...Respondents.

....

Mr. M.M. Vashi for the Petitioner.
Mr. D.A. Dubey i/b. Mr. S.S. Sarkar for Respondent No.1.
Mr. M. D. Siodia i/b. Rustomji & Ginwala for Respondent No.2.

Ms. D.S. Retiwala for Respondent Nos.3 and 5.
Mr. S.R. Page for Respondent No.4.

CORAM : F. I. REBELLO AND
DR.D.Y.CHANDRACHUD, JJ.

February 21, 2006.

ORAL JUDGMENT (Per Dr. D.Y. Chandrachud, J.) :

Rule, by consent returnable forthwith. Counsel appearing on behalf of the Respondents waive service. By consent of Counsel and at their request taken up for hearing.

2. This batch of petitions has been set down for hearing on the request of Counsel since all the petitions involve a common question of law. In Writ Petition 6937 of 2005 which came to be argued as the lead petition before the Court, the Petitioner seeks a direction to the Respondents, all of whom are Public Sector Oil Companies to open the price bid of the Petitioner for the supply of Anhydrous Ethanol and a declaration that the condition stipulated in the tender, of obtaining an endorsement of the name and dosage of the denaturant used should be mentioned on the invoice duly endorsed by the State Excise Authorities, is not applicable to the Petitioner. Similar reliefs have been pressed in the companion

Petitions. In all the petitions before the Court, the only point that has been canvassed is whether compliance can be exacted from the Petitioners of the following condition contained in the tender document, namely :

> "The denaturants should be pre mixed at Ethanol manufacturer end before transporting the Ethanol to Oil Company premises. The name and dosage of the denaturants used should be clearly mentioned on the invoice duly endorsed by State Excise Authorities."

3. In order to appreciate the factual background, some facts can be culled out from Writ Petition 6937 of 2005. The Petitioner has a plant at village Vanivali, Taluka Khalapur, District Raigad for the manufacture of Ethanol. The Petitioner applied for a licence under the Bombay Prohibition Act, 1949 on 17th February 2003. The Petitioner avers in the petition that it then realised that a licence was not required and a Petition under Article 226 of the Constitution (W.P. 1549 of 2004) was instituted before this Court. On 20th April 2004, a Division Bench of this Court issued an interim direction restraining the State of Maharashtra inter alia from requiring the Petitioner to possess a licence for manufacturing Ethanol under the State Prohibition Act. This was in view of the decisions of the Supreme Court in **Bihar Distillery vs. Union of**

India, AIR 1997 SC 1208 and **Vam Organic Chemicals vs. State of U.P.** (1997) 2 SCC 715. Subsequently on 9th July 2004, a Division Bench issued further directions, upon a Notice of Motion, restraining the Respondents from requiring the Petitioner and its purchasers to obtain a transport permit in Form No.DS-IX or any other licence/permit under the Bombay Prohibition Act, 1949 while Ethanol/denatured spirit was delivered. The aforesaid petition has been admitted and the grant of interim relief against the State of Maharashtra has been continued. The interim order of this Court dated 20th April 2004 was carried in appeal by the State of Maharashtra to the Supreme Court in a petition under Article 136 of the Constitution. On 21st February 2005, the Supreme Court dismissed the Special Leave Petition with the following directions:

> "In view of the fact that we have dismissed an earlier petition filed by the State of Maharashtra arising out of the very same writ petition from which this impugned order, we find no merit to entertain this petition. However, we think since the State has the policing power in regard to industrial alcohol this is a fit case where the writ petition should be disposed of at the earliest hence we request the High Court to dispose of the writ petition within three months.
>
> The special leave petition is dismissed."

4. A tender notice was issued by the First Respondent,

Hindustan Petroleum Corporation Ltd., for and on behalf of itself and all the other Oil Companies who are Respondents herein, calling for bids for the supply inter alia of Anhydrous Ethanol. The specifications for Anhydrous Ethanol in the tender inter alia stipulate an Ethanol content of 99.6% by volume at 15.6 degree C/15.6 degree C min. The tender specifications in regard to denaturants are as follows :

> "DENATURANTS:
>
> -1. The denaturant should be added with Ethanol in suitable dosage as per IS: 4117 in line with IS-15464 and as per prescribed Excise regulation from time to time conforming to the automotive fuel requirements.. Denaturants may be considered as a part of Ethanol and component of the fuel. These denaturants should not have detrimental effect on specification and stability of Motor Gasoline.
>
> -2. Some of the Prohibited denaturants for Ethanol that cannot be used are Pyrroles, Methanol, Turpentine, Ketones, Tar, Organo-metallic Compounds.
>
> -3. The denaturants should be pre mixed at Ethanol manufacturer and before transporting the Ethanol to Oil Company premises. The name and dosage of the denaturants used should be clearly mentioned on the invoice duly endorsed by State Excise Authorities."

5. The Petitioner submitted a bid in response to the tender enquiry. During the course of the bidding process, on 8th February

2005, the Petitioner informed the First Respondent that a State Excise licence is not required for the manufacture, production, sale and trade in Ethanol or denatured spirit and copies of the interim orders referred to earlier were submitted. The Petitioners were informed that their price bid was scheduled to be opened. The first tender came to be cancelled and a fresh tender was floated reiterating the requirement of an endorsement by the State Excise Authorities of the name and dosage of the denaturant used. The Petitioner submitted a bid. On 1st September 2005, the First Respondent enquired of the Petitioner, with reference to the aforesaid tender condition, as to whether in the absence of a valid licence, the Petitioner would be able to obtain an endorsement from the State Excise Authorities of the name and dosage of the denaturant used. By a reply dated 15th September 2005, the Petitioner drew attention to the interim order passed in its petition by this Court and noted that it was not required to have a licence for the manufacture, sale or transport of Ethanol from the State Excise Department. The Petitioner, however, stated that it would be in a position to obtain an endorsement from the State Excise Authorities of the name and dosage of the denaturant used. By a letter dated 5th October 2005, the First Respondent stated that the

State Excise Commissioner's Office had clarified that State Excise Authorities will not endorse the invoice of a party which does not possess a valid licence. Accordingly the Petitioner was called upon to explain as to why its tender should not be disqualified. The Petitioner submitted a representation on 7th October 2005 and initiated these proceedings on the apprehension that the First Respondent would not open its price bid and that the Petitioner would be disqualified.

6. The Petitioner submits that it does “not buy rectified spirit and there is no question of the Petitioners mixing denaturant with the rectified spirit to make denatured spirit.” In the circumstances, it has been submitted that the Petitioners do not need an endorsement from the office of the State Excise Commissioner and it would suffice if the Central Excise Authorities “check every invoice and if required ... can endorse each licence”. According to the Petitioners, this Court has passed interim orders restraining the State Excise Authorities from insisting upon the Petitioners possessing a licence for the manufacture, sale and transport of Ethanol under the Bombay Prohibition Act, 1949. Hence, the condition in the tender cannot be applied to disqualify

the bid submitted by the Petitioner.

7. Several affidavits have been filed on behalf of the Respondents in these proceedings. The Respondents first and foremost have drawn the attention of the Court to the observation by the Supreme Court on 21st February 2005, while dismissing the Special Leave Petition against an interlocutory order of this Court in the earlier petition, that "the State has the policing power in regard to industrial alcohol". According to the Respondents, a joint decision was taken by a Committee consisting of representatives of the Oil Industry to introduce condition B-3 in the tender specification for Anhydrous Ethanol, namely that the name and dosage of the denaturant use should be clearly mentioned on the invoice endorsed by the State Excise Authorities. According to the Respondents, the adding of a denaturant with Ethanol and the dosage of the denaturant is of vital importance since otherwise it can be used for unauthorised purposes in a manner detrimental to public interest. A majority of the bidders, it has been stated, have valid licences and have agreed to all terms and conditions including obtaining the endorsement on the invoice of the State Excise Authorities. In fact, the Petitioners had on 15th September

2005 agreed to obtain an endorsement from the State Excise Authorities of the name and dosage of the denaturant used. Technical bids are stated to have been opened on 23rd August 2005 and the price bids on 21st October 2005. In Maharashtra, out of 52 bidders, 37 bids have been found to be technically qualified while in Gujarat 15 out of 20 bids were found to be technically qualified. The price bids of the technically qualified bidders have been opened. In pursuance of a statement made before this Court on 28th October 2005, the Respondents have not finalised the price bids pending further orders.

8. During the course of the hearing of this batch of petitions, it was urged on behalf of the Oil Companies that the Chemical Composition of denatured spirit undergoes changes in the process that is carried out in the establishments of the Petitioners. The Petitioner disputed this in an affidavit dated 14th November 2005 where it was urged that no change takes place in the process of dehydrating water from denatured spirit. This Court by its orders dated 13th January 2006 and 1st February 2006 acceded to the request of parties to permit them to produce such expert opinion as they wish to rely upon in support of their

contentions.

9. In order to appreciate the controversy, it would, in our view, be necessary to advert to the justification put forth by the Respondents of the tender condition. In an affidavit dated 14th December 2005, the Respondents state that tenderers like the Petitioners purchase Special Denaturant Spirit (SDS) for their respective factories from third party suppliers. SDS has to undergo a certain process to result in 99.6% Ethanol. During the aforesaid process, the added denaturant undergoes a change and hence, before despatching Ethanol to the Respondents, tenderers are required to get the denaturant verified by the State Excise Authorities and to obtain an endorsement thereon. According to the Respondents, the Industry Manual on Operation Quality and Safety specifically states that “the denaturant should be premixed at Ethanol manufacturer end before transporting the Ethanol to oil company premises” which means that the denaturant is to be added after the dehydration of water from SDS results in 99.6% Ethanol.

10. The Respondents have relied upon an expert opinion of

Dr. B.N. Thorat of the Chemical Engineering Department in the Institute of Chemical Technology of the University of Mumbai. Extracts from the expert opinion of Dr.Thorat can gainfully be reproduced since this has an important bearing on the justification which the Oil Companies adduce for the tender condition:

> " During the course of converting the Specially Denatured Spirit (hereafter called as SDS) to ethanol of 99.6% concentration, it is likely that the denaturants originally added to 95% ethanol will split into vapors and liquid (and possibly solid phase) and all of it may not land in the final 99.6.% product. The loss will definitely take place depending on the type of denaturant used."
>
> ...
>
> "The extent to which the composition will change will depend on the type of denaturant used. For example, in the case of use of Crotonaldehyde as denaturant the boiling point is 104 degree C which suggest the significant vapor pressure at the time of either azeotropic distillation or the vapor phase molecular sieve separation. ... Significant difference in relative volatility will split the two compounds into two separate phases thereby completely changing its composition, even to the extent of completely metamorphism." ...
>
> "... The thermal separation process does impart chemical conversions such as oxidation in the presence of trace quantifies of chlorides and other catalytic acid impurities. The aldehydes such as crotonaldehyde will undergo oxidation at higher temperatures of separation. Besides these chemical changes, there are certain denaturants which undergo physical changes such as crystallization of Brucine and crotchin and so on."
>
> " ... As a result of thermal processing and the above

> mentioned points, the separation of ethanol and denaturants will be inevitable."
>
> "... ethanol of 99.6% concentration manufactured from SDS does not guarantee the retention of the desired level of denaturant. So, without any additional quantity of denaturant, it will not be possible to declare the 99.6% ethanol to be unfit for potable purpose." (emphasis supplied).

11. It appears that the Petitioner obtained a clarification on 6th February 2006 from Dr. Thorat. The clarification explains the manner in which the process of molecular sieve separation operates in the process wherein SDS, containing about 95% of ethanol the balance being water together with 1% benzene as denaturant, is dehydrated. The clarification notes that benzene will be totally retained in the final dehydrated product while the same cannot be said in regard to the extent of retention of crotonaldehyde.

12. The State of Maharashtra has placed before the Court the view of Prof. S.S. Lele, Professor of Biochemical Engineering, Food Engineering & Technology Department, Institute of Chemical Technology, Mumbai. Prof. Lele highlights certain facets of the process of converting rectified spirit into anhydrous ethanol:

> ". Rectified spirit is an azeotropic mixture (95% ethanol and 5% water) that is obtained by simple distillation;
>
> . SDS i.e. specially denatured spirit contains 5% denaturant so that the ethanol is unsuitable for potable use;
>
> . Extractive distillation and molecular sieve processes are commonly used to obtain anhydrous ethanol from the rectified spirit or from SDS as the case may be;
>
> Anhydrous ethanol in denatured form is used as fuel."

Prof.Lele emphasizes that both extractive distillation and a molecular sieve can reduce or remove denaturant compounds :

> "**Both extractive distillation and molecular sieve are unit operations designed for separation of molecules based on differential properties, namely the boiling points and molecular size. In principle these unit operations can reduce and/or remove the denaturant compounds.**" (emphasis supplied).

Again Prof. Lele confirms that :

> "Comment : Extractive distillation and or molecular sieves of appropriate design can separate ethyl alcohol, water and other denaturing compounds, partially or completely depending on the process and design parameters." (emphasis supplied).

Finally, Prof.Lele has furnished two sequences leading upto the eventual production of denaturant ethanol fuel:

"Sequence 1 :

Step 1 : Rectified spirit + denaturant -> SDS

Step 2 : SDS -> anhydrous ethanol + effluent

Step 3: Anhydrous Ethanol + denaturant (make up) -> Denatured Ethanol fuel

When SDS is used to prepare anhydrous ethanol, the separated water phase may be contaminated by other denaturants and thus produce hazardous waste water that needs to be treated further. (emphasis supplied).

Sequence 2:

Step 1 : Rectified Spirit -> Anhydrous Ethanol + water
Step 2 : Anhydrous Ethanol + denaturant -> Denatured Ethanol fuel.

Technically speaking, alcohol – water azeotrop (rectified spirit) should be directly converted to anhydrous ethanol by suitable method and then denatured by adding specified denaturant in desired amount to produce Denatured Ethanol fuel. When rectified spirit is used directly for getting anhydrous alcohol (ethanol) the water phase produced as effluent in the dehydration process is relatively pure." (emphasis supplied).

13. The validity of the approach of the Respondents and, the legality of the tender condition must now be assessed. Before doing so, it would be necessary, briefly, to advert to the settled

parameters that govern the exercise of the jurisdiction of the Court under Article 226 of the Constitution in a matter such as the present. The Respondents are authorities of the "State" as defined by Article 12 of the Constitution and their decisions are amenable to judicial review. At the same time, the Court has to be conscious of the fact that judicial review is sought to be invoked in a matter relating to an invitation of tender that would eventually result in the award of a contract for the supply of anhydrous ethanol. The Oil Companies have taken recourse to an invitation to tender for this product as part of policy of the Government of India to supply environment friendly fuel to consumers. In matters of contract, for that matter including the process of inviting tenders that would lead to the eventual award of a contract, the Court recognises the necessity of allowing a business discretion – one that would contemplate a wide latitude for decision making - that would be valid so long as it does not offend the constitutional parameters of fairness and equal treatment that underlie Article 14 of the Constitution. The test that is often applied is one of Wednesbury reasonableness, that is to say, a decision would be interfered with, if it is so unreasonable that no reasonable body of persons could ever be expected to have taken such a decision. Irrationality and

perversity are other grounds on which the Courts test the validity of an administrative decision. In such cases, the contractual realm, when one of the parties to the contract happens to be a public body governed by the mandate of Part III of the Constitution, is not entirely immune from judicial review. The extent of review is, however, a separate issue and particularly in matters of contract, Courts would be reluctant to side step the discretion exercised properly and wisely by the authority which best assesses its needs and requirements. Tender conditions, it is settled law, are by and large immune from judicial review (Tata Cellular Vs. Union of India, AIR 1996 SC 11).

14. Though as a general principle, tender conditions are relatively immune from judicial review, we must in the present case consider the validity of the condition with reference to the submission of the Petitioner that under the law as it stands the Petitioner is not required to obtain a licence from the State Excise Authorities under the Bombay Prohibition Act, 1949. Undoubtedly, a contracting party cannot be compelled by an authority of the State to forsake a constitutional right or principles as a condition for being allowed to participate in the process leading to the award of

a contract. The condition which has been imposed by the Respondents in the present case, however, requires bidders to ensure that the denaturant should be premixed at the “Ethanol manufacturer end” before transporting the Ethanol to oil company premises. In other words, what the condition postulates is the mixing of the denaturant at the premises of the manufacturer of ethanol before the product is transported to the oil company. Admittedly, in the present case, the Petitioners purchase SDS in which denaturant has already been mixed before the product arrives at the premises of the Petitioners. The product is subjected to further process at the premises of the Petitioners for the purpose of raising the ethanol content to 99.6% as required by the specifications of the oil companies. The opinions produced before the Court of experts drawn from the Institute of Chemical Technology of the University of Mumbai are all unanimous in the view which they express that in the process of converting SDS to ethanol with a concentration of 99.6%, a loss of denaturant is in fact, liable to take place. The extent to which the composition of the denaturant will change depends upon the denaturant used. The separation of ethanol, alcohol, water and other denaturating compounds is liable to be partial or complete depending on the

process and design parameters. The expert opinion that has been produced before the Court does, at the least prima facie, demonstrate that the concerns of the oil companies cannot be brushed aside. We are not concerned in these proceedings with the extent to which the policing power of the State Government can extend in the scheme of the Constitutional entries contained in the Seventh Schedule to ensuring that industrial alcohol is not diverted for potable purposes. The Court is essentially concerned here with the question as to whether a tender condition that has been imposed by the oil companies is so palpably arbitrary as to offend the constitutional requirement of fair and equal treatment. We have come to the conclusion that the tender condition does not fall into that rather exceptional class of cases where the Court may be inclined to hold that a particular condition is palpably arbitrary or absurd. The tender condition stipulates that the denaturant must be added at the premises of the ethanol manufacturer before the product is transported to the oil company and that there ought to be a certification by State excise authorities of the nature and dosage of the denaturant used. The affidavits and the expert reports which have been produced before the Court establish the rationale which underlies such a requirement. In fact, the report of Prof.Lele states

that technically speaking, rectified spirit should be directly converted to anhydrous ethanol by a suitable method and then denatured by adding a specified denaturant in a desired amount to produce Denatured Ethanol fuel. These are matters which are best left to experts and even if experts often differ (though that is not the case here), the Court would not be justified in striking down the tender condition by substituting its own view of a scientific prescription for a view which has appeared to the oil companies in the present case as just and proper. We do not find any infirmity in the decision. Several bidders are in the fray and in response to the tender enquiry, several technically qualified bids have been received. It cannot be urged that the tender condition was tailored to exclude competition and that is not even in fairness of the submission of the Petitioner.

15. Before concluding, we clarify that in this batch of matters, we have dealt with the submissions that have been urged namely, in regard to the validity of the tender condition imposed by Oil Companies. The dispute before the Court related to the tendering process. In the event that any of the Petitioners have any other issues which they seek to agitate in regard to the policing power of

the State Government in relation to Industrial alcohol, it would be open to them to adopt such remedies are are separately open in law. Consistent with the well settled position in law, we have for the purposes of these proceedings confined the judgment to the issue which was raised.

16. For all the aforesaid reasons, we do not find any merit in this batch of Petitions. The Petitions shall, in the circumstances, stand dismissed. There shall be no order as to costs.

(F. I. Rebello, J.)

(Dr.D. Y. Chandrachud, J.)